

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2828-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL LOVE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Michael Love appeals from his conviction, following a jury trial, of first-degree intentional homicide while armed with a dangerous weapon. See §§ 940.01(1) and 939.63, STATS.¹ He argues that the trial

¹ Although Love was sixteen years old when he committed the crime, he was waived into adult court on March 17, 1993.

court erroneously refused to redact certain portions of his statement to police about planning a separate crime. We affirm.

On February 4, 1993, after a brief argument over a sale of phony drugs, Love shot Duane Lewis at point-blank range with a sawed-off shotgun, killing him. Love was convicted of first-degree intentional homicide while armed and was sentenced to life imprisonment.

Love's only issue on appeal is whether the trial court erred in refusing to redact portions of the statement he gave to police. In that statement, Love described how he and a few friends were planning "to rob a store and a doughnut deliveryman." Before the robbery could take place, Love shot Lewis, and the robbery plot was never executed.

In deciding whether to admit evidence of prior bad acts, the trial court must determine whether the evidence is admissible under RULE 904.04(2), STATS.,² and then consider whether the probative value of such evidence and the necessity for its admission are substantially outweighed by the danger of unfair prejudice under RULE 904.03, STATS.,³ *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991), *denial of habeas corpus sub nom., Kuntz v. McCaughtry*, 806 F. Supp. 1373 (E.D. Wis. 1992). Evidence may also be

² RULE 904.04(2), STATS., provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

³ RULE 904.03, STATS., provides:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

admitted under RULE 904.04(2), STATS., when the evidence furnishes part of the context of the crime or is necessary to a full presentation of the case. *In re C.V.C.*, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). An appellate court reviews a trial court's evidentiary rulings for an erroneous exercise of discretion. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). If the trial court errs in its reason for admitting evidence, the decision may still be affirmed if another basis for admission exists. *State v. Amrine*, 157 Wis.2d 778, 783, 460 N.W.2d 826, 828 (Ct. App. 1990).

The State argued that the portions of Love's statement relating to the planned robbery were probative of Love's state of mind and his willingness to use a weapon to commit a crime, making them admissible under § 904.04(2), STATS. In response to the defendant's request that this portion of his statement be excluded, the trial court opined: "I don't think you can pick apart a statement by a defendant. I think ... you have to take it as a whole," and found that the prejudicial effect of the statements did not outweigh their probative value. *See* § 904.03, STATS. The trial court admitted the entire statement except for references to prior arrests, which it redacted.

Love testified that he and his friends were at the home of a friend, "talking about robbing the store or the doughnut delivery man." Love testified that one friend pulled a sawed-off shotgun from his closet for the robbery. Later the friends borrowed a shotgun from another friend to use in the robbery. Love testified that while the friends were watching for the delivery man to rob, Lewis came to the door of the house, asking for his money back for phony drugs Love sold him. Love went to the door, they spoke briefly, and Love shot Lewis. Love claims that he shot in self-defense, and testified that he thought that Lewis was trying to get a gun from his pocket. Love's state of mind when he went to the door with a shotgun, i.e., his willingness to use it offensively, was, therefore, relevant. Those portions of Love's statement regarding the robbery plan were therefore admissible as state-of-mind evidence under RULE 904.04(2), STATS. Thus, the trial court's erroneous conclusion that it could not redact portions of Love's statement is not material. *See Amrine*, 157 Wis.2d at 783, 460 N.W.2d at 828. Further, the trial court did not misuse its discretion in concluding that the evidence's prejudicial value did not substantially outweigh its probative value. *See Pharr*, 115 Wis.2d at 347, 340 N.W.2d at 503-504. We affirm.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.